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Supreme Court, U.S.
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No.____

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

-against-

PAUL BOGHGOSIAN,

Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner Paul Boghosian was convicted, following a jury trial, of one count of conspiring to commit bankruptcy fraud by submitting certain purportedly fraudulent documents to a bankruptcy court in connection with a plan to reorganize an airline and one count of violating the Travel Act by faxing a document across interstate lines, which the Government claimed was done as part of a bribe to secure a loan in furtherance of the reorganization plan. The core of the defense to both charges consisted of the testimony of Mr. Boghosian in support of which several other witnesses testified on his behalf as well. On appeal to the Court of Appeals for the Second Circuit, the court vacated the conspiracy conviction due to an interested witness instruction that undermined Mr. Boghosian's presumption of innocence further noting that the conspiracy case against Mr. Boghosian was "close." The court, however, did not vacate the Travel Act conviction, opining that evidence independent of Mr. Boghosian's testimony existed that was sufficient to convict him and was untainted by the erroneous interested-witness charge.

The Question Presented is:

In a multiple-count criminal case, where the conduct underlying the counts was interrelated, the evidence against the defendant was not overwhelming, the core of the defense to all counts was the defendant's testimony, and the trial court

delivered an interested witness jury instruction that undermined the defendant's presumption of innocence, does the vacatur of one or more convictions, but not all, due to the prejudicial effect of the erroneous jury instruction deprive the defendant of his rights to a trial by jury, due process of law, and a fair trial?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Paul Boghosian respectfully petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Second Circuit, dated June 18, 2008, in this case.

OPINIONS BELOW

The Order of the U.S. Court of Appeals, for the Second Circuit, decided February 26, 2008, (App. 6-7) is found at 267 Fed.Appx. 35, 2008 WL 510560 (2nd Cir. 2008).

The Order of the U.S. Court of Appeals, for the Second Circuit, decided June 18, 2008, (App. 1-5) is an unreported decision.

STATEMENT OF JURISDICTION

The U.S Court of Appeals for the Second Circuit issued its Order June 18, 2008. This Court has jurisdiction under 28 U.S.C. §1254(1)

RELEVANT STATUTORY PROVISIONS

Petitioner was convicted, following a jury trial, of one count of conspiracy to commit bankruptcy fraud (18 U.S.C. § 157) in violation of 18 U.S.C. § 371 and one count of violating the Travel Act, 18 U.S.C. § 1952(a)(3).

18 U.S.C. § 157 provides in relevant part:

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11...at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title, shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 371 provides in relevant part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1952(a)(3) provides in relevant part:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to...(3) promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform (A) an act described in paragraph...(3) shall be fined

under this title, imprisoned not more than 5 years, or both[.]

New York Penal Law § 180.03 provides:

A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars.

STATEMENT OF THE CASE

A. Introduction

Petitioner Paul Boghosian ("Mr. Boghosian") was convicted, following a jury trial, of one count of conspiracy to commit bankruptcy fraud (18 U.S.C. § 157) in violation of 18 U.S.C. § 371 ("the conspiracy conviction), and one count of violating the Travel Act, 18 U.S.C. § 1952(a)(3) ("the bribery conviction"). The prosecution arose from an alleged conspiracy involving William H. Spencer ("Dr. Spencer") and Petitioner Paul Boghosian. Dr. Spencer was the pastor of a church in Oakland, California, for whom, according his attorney and chief counsel to Christian Legal Services, Leonard Brady, Esq., it was not unusual to participate in transactions involving $300 million or more as the trustee of a trust fund, E & M Trust.

Mr. Boghosian is a 51-year-old husband and father with no prior criminal record who has lived and worked in the St. Louis, Missouri area his entire life. Mr. Boghosian is a business consultant who had previously worked in the automobile industry, having briefly been an owner of a new car dealership. He completed "some college," but did not graduate, and has no law or business degrees.

The Government claimed that Mr. Boghosian and Dr. Spencer ("the defendants") conspired to commit fraud in connection with the federal bankruptcy proceeding of Hawaiian Airlines that was pending in the United States Bankruptcy Court for the District of Hawaii (the "Bankruptcy Court"). More specifically, the Government alleged that the defendants conspired to make a series of materially false statements concerning their ability to provide the funds necessary to reorganize the airline. The Government further alleged that Mr. Boghosian

agreed to pay a bribe in furtherance of this supposed conspiracy.

Mr. Boghosian's defense was that he lacked criminal intent because he acted in good-faith reliance on the representations of Dr. Spencer and others, and that he never agreed to bribe anyone. Central to that defense was Mr. Boghosian's own testimony. The District Court, over the objection of Mr. Boghosian's counsel, instructed the jury that Mr. Boghosian's "deep personal interest in the outcome of his prosecution" -- indeed, "the greatest interest in its outcome" -- is "of a character faced by no other witness" and "creates a motive for false testimony."

The jury subsequently returned a verdict finding Mr. Boghosian guilty of both charges. On appeal to the U.S. Court of Appeals for the Second Circuit, Mr. Boghosian argued that the District Court's instructions seriously prejudiced Mr. Boghosian because they undermined the presumption of innocence to which he was entitled and that, given the centrality of Mr. Boghosian's testimony on the close question of intent at the heart of the prosecution, the errors could not be considered harmless. Accordingly, Mr. Boghosian argued a new trial was required.

The Court of Appeals agreed, in part, and vacated Mr. Boghosian's conspiracy conviction, but not his bribery conviction. In reaching that conclusion, the court concurred that the District Court's instructions undermined the presumption of innocence to which Mr. Boghosian was entitled because those instructions presupposed his guilt. The court further found that, as a result of those erroneous instructions, a reasonable possibility existed that they contributed to Mr. Boghosian's conspiracy conviction because "[t]his was a close case" that "boiled down to the credibility of [Mr.

Boghosian's] testimony" and the erroneous interested-witness charge "went directly to the heart of the matter submitted to the jury." (App. 3-4).

However, the court affirmed Mr. Boghosian's bribery conviction since, in the court's view, his testimony in connection with that offense was belied by evidence independent of that testimony that was untainted by the erroneous interested-witness charge. The court therefore concluded that, unlike the conspiracy charge, that there was no reasonable possibility that the erroneous interested witness charge contributed to Mr. Boghosian's bribery conviction.

It is respectfully submitted that the result reached by the Court of Appeals - the vacatur of one count due to an instruction that undermined Mr. Boghosian's presumption of innocence deprived Mr. Boghosian of his rights to a trial by jury, due process, and a fair trial since i) the two crimes were interrelated, ii) the core of the defense to both crimes was Mr. Boghosian's testimony, iii) the evidence against Mr. Boghosian was not overwhelming, and iv) the instruction intruded upon a fundamental jury role (the evaluation of a defendant's testimony) that was universal in its application (i.e., applicable to both counts). Thus, the prejudicial impact of the constitutionally defective instructions could not be dissected in the manner propounded by the court. Accordingly, this Court should vacate the Court of Appeals decision and remand this matter for a new trial as to both counts.

B. The charges

In April 2005, Mr. Boghosian and Dr. Spencer were indicted in the Southern District of New York. The indictment contained three counts. Count One charged both defendants with conspiracy to commit

bankruptcy fraud in violation of 18 U.S.C. §§ 157 and 371. Counts Two and Three were directed solely against Mr. Boghosian and charged Mr. Boghosian with using interstate facilities to commit the New York State offense of first-degree commercial bribery [New York Penal Law § 180.03] in violation of the Travel Act, 18 U.S.C. § 1952(a)(3).

Count Two charged that, on or about February 21, 2005, Mr. Boghosian violated the Travel Act by traveling from St. Louis, Missouri to New York with the intent to promote commercial bribery, in violation of New York State law. Count Three charged that, on or about February 22, 2005, Mr. Boghosian violated the Travel Act by causing a facsimile to be transmitted from St. Louis, Missouri to New York with the intent of promoting commercial bribery, in violation of New York State law in furtherance of the bankruptcy fraud and bribery scheme conspiracies. (Count Two was dismissed for lack of evidence at the end of the Government's case. At that point, Count Three was renumbered as Count Two).

C. The Trial

1. The Government's Case

The Government's proof showed that, on March 21, 2003, Hawaiian Airlines filed with the Bankruptcy Court a voluntary petition for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code. On July 29, 2004, an entity known as Hawaiian Investment Partners Group LLC ("Hawaiian Investment Partners") filed a plan of reorganization for Hawaiian Airlines with the Bankruptcy Court (the "Hawaiian Investment Plan"), as did the Bankruptcy Trustee presiding over the proceedings. Mr. Boghosian was the operating manager of Hawaiian Air Joint Venture ("Hawaiian Air Joint Venture"), a financial backer of, and

potential participant in, the Hawaiian Investment Plan. Dr. Spencer, purported to be the trustee of the E & M Trust, which owned a majority equity interest in the Hawaiian Air Joint Venture.

From November 2004 through March 2005, Mr. Boghosian and Dr. Spencer made representations in submissions to the Bankruptcy Court regarding their ability to fund the Hawaiian Investment Plan, which required $300 million in new financing. Mr. Boghosian and Dr. Spencer stated in filings made under oath to the Bankruptcy Court that, through various entities they controlled, they could provide the necessary financing. Mr. Boghosian contended that he believed these statements to be true when he made them, based on the sworn statements and purported financial records attesting to Dr. Spencer's financial capacity that were provided by Dr. Spencer to Mr. Boghosian and the Bankruptcy Court. The statements and records included documents that purported to be proof of funds, including supposed bank records proving the existence of a bank account located at ABN Amro Bank in the Netherlands that contained $500 million held by the E & M Trust, of which Dr. Spencer was both the trustee and a beneficiary.

The Government also sought to prove that Mr. Boghosian had attempted to commit bribery in furtherance of the alleged scheme. Toward that end, the prosecution relied on a secretly recorded meeting on February 21, 2005, between Mr. Boghosian and Special Agent Michael Keeley of the FBI, who was posing as "Jay Parker," the manager of a fictional hedge fund. During the meeting, Agent Keeley proposed that his hedge fund would provide $2.5 million in "mobilization funds" -- i.e., funds needed to cover legal expenses, travel costs, and other expenses related to the process of obtaining the Hawaiian Investment Plan's confirmation -- to support the

Hawaiian Investment Plan if Mr. Boghosian agreed to pay $500,000 back to the agent into a supposed offshore bank account. The Government claimed that Mr. Boghosian agreed to pay this money as a "bribe." The next day Mr. Boghosian e-mailed Agent Keeley paperwork for the deal and a promissory note for $2.5 million, which the Government alleged included the $500,000 "bribe" to which Mr. Boghosian had supposedly agreed.

A tape recording of the conversation between Mr. Boghosian and Agent Keeley showed that, contrary to agreeing to a bribe, Mr. Boghosian said to Agent Keeley "I'm trying to do a straight deal." Further, when Agent Keeley pressed Mr. Boghosian to pay him a $500,000 secret payment, Mr. Boghosian resisted and expressed a desire to consult his counsel before agreeing to anything. Then, when Agent Keeley said to Mr. Boghosian, "I'm essentially, I'm stealing money from the Hedge Fund," Mr. Boghosian seemed shocked by the statement responding "Oh my God." He then said, "I don't know," and proposed that the two men talk again the next morning. In communications the next day, there was no mention of any bribe or other illegal kickback to Agent Keeley.

2. The Defense Case

Mr. Boghosian mounted a vigorous defense, calling a total of four witnesses, Kendra Sturgeon, Captain Robert Konop, Steven Kratsch, Esq., and, most importantly, Mr. Boghosian himself.

a. Kendra Sturgeon

Kendra Sturgeon is a professional fund-raiser for various business ventures and charities. She has earned three degrees, including a law degree and an MBA. Ms. Sturgeon had known Mr. Boghosian for several years and had worked with him on various

business deals, including the attempted acquisition of Hawaiian Airlines. Her role in that respect was to assist Mr. Boghosian in locating financing for the project.

Ms. Sturgeon testified that it was she who had lined up Dr. Spencer to be Mr. Boghosian's source of funding for the Hawaiian Airlines transaction through providing Mr. Boghosian with information showing that Dr. Spencer could be an appropriate funding source for the Hawaiian Airlines transaction.

Ms. Sturgeon also testified that Mr. Boghosian had hired an attorney named Tim Phillip to assist with the Hawaiian Airlines transaction. Attorney Phillip's role was "to do due diligence and make sure that the people we were dealing with were real or bona fide," and "did have the capacity to do what they said they could." Attorney Phillip was also supposed "to provide all the documentation for the project, make sure everything was filed timely, that it was in the right format and everything was done appropriately and legally."

b. Captain Robert Konop

Captain Robert Konop had worked for 20 years as a pilot for Hawaiian Airlines. He was also a former law enforcement officer and has a master's degree in business. Cpt. Konop was involved with 70 or 80 other Hawaiian Airlines employees trying to put together a plan to reorganize the airline. Mr. Boghosian and Cpt. Konop agreed to work together toward presenting and confirming the Hawaiian Investment Plan. Cpt. Konop testified that he had reviewed the affidavits of Mr. Boghosian and Dr. Spencer that were prepared during the Hawaiian Airlines bankruptcy. Although Cpt. Konop had concerns about whether the affidavits and attachments would be sufficient to obtain

confirmation of the Hawaiian Investment Plan, he never suspected that Dr. Spencer's "proof of funds" documents were not authentic.

c. Steven Kratsch, Esq.

Steven Kratsch is a bankruptcy attorney with more than 20 years of experience who was a former partner of large, reputable law firm, Kutak Rock, LLP, with offices throughout the United States. He testified that his role in the Hawaiian Airlines bankruptcy was to review the draft Hawaiian Investment Plan and supporting disclosure statement and make the Plan "bankruptcy law compliant and get it confirmed."

Attorney Kratsch devoted approximately 350 hours (costing more than $100,000) to the proposed Hawaiian Airlines acquisition between mid-October 2004 and mid-January 2005. In mid-January 2005, Attorney Kratsch fell ill and had to withdraw from the representation. Throughout that time, he did not have a concern about Dr. Spencer's ability to finance the Hawaiian Investment Plan, and, in that vein, he never advised Mr. Boghosian of any potential criminal liability or possible fraud in connection with the Hawaiian Airlines bankruptcy.

d. Paul Boghosian

Mr. Boghosian took the stand in his own defense. He denied that he was knowingly involved in any conspiracy or scheme to defraud. He also denied that he had attempted to bribe anyone.

Mr. Boghosian described how he met Dr. Spencer through Ms. Sturgeon and that he first spoke with Dr. Spencer in August 2004. During the call, Dr. Spencer expressed his interest in acquiring the airline and requested that Mr. Boghosian forward to

him a copy of the disclosure statement, the plan of reorganization, and an overview of Mr. Boghosian's interest in Hawaiian Airlines. In a follow-up conversation, Dr. Spencer told Mr. Boghosian he was interested in participating in the acquisition of Hawaiian Airlines and that he wanted "to be the first African-American to own an airline."

Mr. Boghosian asked Dr. Spencer to provide proof of his financial ability to participate in the Hawaiian Airlines acquisition. Dr. Spencer sent Mr. Boghosian a document that represented that $500 million was being held by ABN-Amro Bank in the name of E & M Trust and in care of Dr. William Spencer and Richard Warren.

Mr. Boghosian testified that he gave a copy of this document to Attorney Phillip, whose role was to gather any information on any person or any entity related to the Hawaiian Airlines transaction and review documents and report any irregular or illegal conduct to Mr. Boghosian and Dr. Spencer, so he could review it and check it and make sure it was authentic.

Mr. Boghosian also relied on an attorney named Randal Yoshida, Esq., local counsel for the Hawaiian Investment Plan in connection with the Hawaiian Airlines bankruptcy. Like Attorney Phillip, Attorney Yoshida's role was to perform due diligence and review all the documents. Mr. Boghosian testified that neither Attorney Phillip nor Attorney Yoshida ever told him that any of Dr. Spencer's documentation was not authentic.

Mr. Boghosian also testified that he relied on other lawyers in connection with the Hawaiian Airlines bankruptcy, including Attorney Kratsch, lead bankruptcy counsel for the Hawaiian Investment Plan, and that he (Mr. Boghosian) was

never advised by Attorney Kratsch that any of the documents provided by Dr. Spencer were not authentic.

Another lawyer upon whom Mr. Boghosian relied was a New York attorney Elliot Bloom, Esq., counsel for the Hawaiian Investment Plan in dealings with the SEC and who also reviewed documents filed in the Bankruptcy Court. He also never told Mr. Boghosian that any of the documentation that had been filed relating to Dr. Spencer was not authentic.

Mr. Boghosian testified that he also spoke by telephone in early 2005 with Leonard Brady, Esq., Dr. Spencer's personal attorney and Chief Counsel to Christian Legal Services, about Attorney Brady's relationship with Dr. Spencer and his knowledge of Dr. Spencer's financial situation. Attorney Brady told Mr. Boghosian that he was familiar with Dr. Spencer and the E & M Trust, that he was aware that Dr. Spencer had made a commitment to provide $300 million to finance the acquisition of Hawaiian Airlines, and that he was familiar with Dr. Spencer and E & M Trust and their involvement in "transactions of that size or greater."

Mr. Boghosian also testified in detail about his meeting in New York on February 21, 2005 with purported hedge fund manager "Jay Parker" (Agent Keeley). Mr. Boghosian understood that the sole purpose of the meeting was to discuss the rate, term, and amount of the loan for the mobilization funds. He further believed that the purpose of the meeting was to give Agent Keeley a chance to meet him "face to face" so Agent Keeley could "put a face with the loan he was proposing." Mr. Boghosian had no idea that Agent Keeley planned to propose something illegal at the meeting. (Indeed, the original second count of the Indictment, accusing Mr. Boghosian of traveling from St. Louis, Missouri to New York with

the intent to promote commercial bribery, was dismissed by the District Court for lack of evidence).

Mr. Boghosian testified that he understood that during their meeting that a certain amount of money would be disbursed from the hedge fund to Mr. Boghosian as mobilization funds of which some money would be paid back to Agent Keeley. In response to a statement by the agent that he (Agent Keeley) was essentially stealing from the hedge fund, however, Mr. Boghosian "didn't take him seriously." He thought that the agent was "posturing" through employing a negotiation technique, the goal of which was to get Mr. Boghosian to pay more for the loan. In addition, as Mr. Boghosian testified at trial, the agent's claim that he was essentially stealing from the hedge fund "just didn't make any sense to me.... I was confused on how someone steals from themselves." In the end, Mr. Boghosian and Agent Keeley did not reach an agreement by the close of their meeting. As Mr. Boghosian made clear, "There was no understanding whatsoever."

Although the meeting left Mr. Boghosian annoyed, when he arrived home the following morning, he contacted Attorney Phillip, discussed with him the conversation that he had had with Agent Keeley and had Attorney Phillip prepare a non-binding memorandum of understanding in the form of a counter-proposal that contained different terms than the ones that had been proposed by the agent. As per the terms of the memorandum, Agent Keeley was supposed to provide a binding agreement that outlined all the terms and conditions of the transaction upon which the parties could agree.

Mr. Boghosian also explained that when, during his meeting with Agent Keeley, he had asked the agent if the agent was giving Mr. Boghosian "directives outside of the paperwork," he wanted to

make sure that Agent Keeley was providing a definitive agreement in which all the terms and conditions were to be included and that there would be no outside agreements." Agent Keeley replied that he would not provide any such directives outside of the agreement, but he never produced a definitive agreement.

The next day, February 22, 2005, Mr. Boghosian faxed over to Agent Keeley a promissory note for the principal amount of $2.5 million signed by Dr. Spencer, as trustee of E & M Trust, with "Transcapital Partners, LLC" as th holder of the note. The note provided that E & M Trust, as the borrower, was obligated to repay the loan with interest thereon at the rate of 10% per annum within a year from the date of the note. In the event that Hawaiian Air Joint Venture was successful in acquiring Hawaiian Airlines, Dr. Spencer was further obligated to provide Transcapital Partners with $1 million of preferred stock in the reorganized airline.

Mr. Boghosian and Agent Keeley subsequently met in St. Louis, about two weeks later, at the behest of the agent. Mr. Boghosian was anxious to see what the agent had to offer at that time since Agent Keeley was "two weeks in default." The agent handed some documents to Mr. Boghosian, who told the agent to fax them to Attorney Phillip so the latter could review them. However, the moment that Mr. Boghosian returned the documents to the agent, Mr. Boghosian was arrested.

Mr. Boghosian flatly denied agreeing to having participated in any bribe and repeatedly testified that he considered the amount that Agent Keeley sought for himself was his fee for disbursing the loan. No matter how many times asked by the prosecutor, and regardless of the many different ways phrased by the prosecutor, Mr. Boghosian repeatedly denied that

he had participated in a bribe since "the transaction would never have gotten that far."

3. The Jury Charge

The District Court's jury charge included an interested witness instruction pertaining to Mr. Boghosian's testimony. The charge read, in part, as follows:

> The law permits, but does not require, a defendant to testify on his own behalf. Obviously a defendant has a deep personal interest in the outcome of his prosecution. Indeed, it's fair to say that he has the greatest interest in its outcome. Interest creates a motive for false testimony, and a defendant's interest in the result of his trial is of a character faced by no other witness. In appraising Mr. Boghosian's credibility, you may take that fact into consideration.

The court also included elsewhere in its charge a separate, a more general "interested witness" instruction. The only witness the court specifically identified to the jury as having an "interest in the outcome" of the prosecution was Mr. Boghosian.

The jury subsequently returned guilty verdicts against both Dr. Spencer and Mr. Boghosian, convicting the latter of conspiracy to commit bankruptcy fraud and commercial bribery.

D. Sentencing

Upon sentencing, District Court Judge Loretta A. Preska found that the applicable sentencing range under the United States Sentencing Guidelines was 51 to 63 months of imprisonment. The court, however, imposed a sentence of 24 months. In

deciding to impose that reduced sentence, the court found the letters that had been submitted in support of Mr. Boghosian "document this defendant's extreme work ethic throughout his entire life, including, interestingly enough, in connection with this matter."

E. The Appeal

Mr. Boghosian subsequently appealed his convictions to the U.S. Court of Appeals for the Second Circuit, relying on the Court of Appeals' decisions in *United States v. Assi*, 748 F.2d 62, 68 (2d Cir. 1984) and *United States v. Gaines*, 457 F.3d 238, 244-50 (2d Cir. 2006), essentially arguing that the District Court's interested witness instructions seriously prejudiced Mr. Boghosian's defense because the instructions undermined Mr. Boghosian's credibility and the presumption of innocence to which he was entitled.

Mr. Boghosian further argued on appeal that the erroneous jury charge was not harmless since it could not be said, under the test to review constitutional errors enunciated *Chapman v. California*, 386 U.S. 18 (1967), that there was no "reasonable possibility" that the flawed instructions "contributed to the verdict." *Id.* at 24. Mr. Boghosian's defense depended heavily, if not entirely, on Mr. Boghosian's testimony, as a result of which, if the jury had credited his testimony, Mr.Boghosian would have been acquitted of both counts. However, the erroneous charge, by presuming his guilt, interfered with the jury's ability to assess his veracity properly.

The Court of Appeals agreed, in part, with Mr. Boghosian's arguments, but it only vacated one of his two convictions, (i.e., the conspiracy conviction, but not the bribery conviction). In reaching that result, the court concurred with Mr. Boghosian that the District Court's instructions undermined the

presumption of innocence to which Mr. Boghosian was entitled because those instructions presupposed his guilt, and, as the court further found, a reasonable possibility existed that those instructions contributed to his conviction, at least insofar as the conspiracy charge was concerned, because "[t]his was a close case" that "boiled down to the credibility of [Mr. Boghosian's] testimony" and the erroneous interested-witness charge went directly to the heart of the matter submitted to the jury. (App. 3-4).

However, even though Mr. Boghosian's testimony as to the bribery charge formed the core of his defense to that charge as well, the court affirmed his conviction for that charge since, in the court's view, Mr. Boghosian's testimony was belied by evidence independent of that testimony that was untainted by the erroneous interested-witness charge. Thus, unlike the conspiracy charge, the court opined that there was no reasonable possibility that the erroneous charge contributed to Mr. Boghosian's bribery conviction:

> [W]e affirm Mr. Boghosian's commercial bribery conviction. Mr. Boghosian testified that he interpreted the undercover agent's characterization of their agreement—as "essentially stealing" from the hedge fund—to be merely an attempt to drive up the price. Mr. Boghosian also testified that he sent a counteroffer to the agent the following day, rather than an acceptance. These explanations are belied by the videotape recording of Mr. Boghosian agreeing to wire $500,000 to the agent's personal offshore account and by Mr. Boghosian's transmittal of a signed promissory note reflecting the terms proposed by the agent. This evidence was independent of Mr. Boghosian's testimony

> and was therefore untainted by the erroneous interested-witness charge, permitting us to conclude that there is no "reasonable possibility" that the error contributed to Mr. Boghosian's commercial bribery conviction. *Brutus*, 505 F.3d at 88.
>
> Accordingly, we vacate Mr. Boghosian's conspiracy conviction and remand for retrial, and we affirm his commercial bribery conviction. (App. 4-5).

F. The Rehearing Petition

After the Court of Appeals issued its decision, Mr. Boghosian petitioned the court for a panel rehearing or rehearing *en banc* of the Order affirming his bribery conviction. In support of the petition, Mr. Boghosian argued that the improper interested-witness instruction prejudiced Mr. Boghosian on the bribery charge just as it did on the conspiracy charge. If, Mr. Boghosian argued, a properly instructed jury could have credited Mr. Boghosian's testimony that he honestly believed Dr. Spencer's representations regarding his access to vast sums of money, it also could have concluded that Mr. Boghosian intended to repay the loan to the hedge fund (with 10 percent interest) out of those funds, and that he lacked the intent to cause economic harm to the hedge fund, an element of the crime of commercial bribery, as the District Court specifically charged the jury pursuant to New York law. See *People v. Wolf*, 772 N.E.2d 1124, 1126-33 (N.Y. 2002). The prejudicial effect of the interested witness charge therefore easily could have spilled over onto the bribery count as well. For that reason, Mr. Boghosian argued, the Government had not shown beyond a reasonable doubt that the interested-witness instruction was harmless as to either count.

By Order dated and entered June 18, 2008, the Court of Appeals denied the petition without elaboration of the reasons for the denial. (App. 6-7).

REASONS FOR GRANTING THE WRIT

As this Court has recognized, "[t]he right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle v. Williams*, 425 U.S. 501, 503, (1976), *citing*, *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975). In that vein, "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle*, 425 U.S. at 503. "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process." *Estelle*, 425 U.S. at 503. "The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Estelle*, 425 U.S. at 504.

One such factor calling for close judicial scrutiny is the propriety of a trial court's jury instruction regarding the process by which a jury should evaluate the credibility of a defendant who takes the stand on his own behalf. One reason for this was articulated by this Court more than 100 years ago in *Hicks v. United States*, 150 U.S. 442, 452 (1895) in which the Court stated:

> [I]t must be remembered that men may testify truthfully, although their lives hang in the balance, and the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly

> enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. *Hicks*, 150 U.S. at 452.

More recently, the propriety of a trial court's jury instruction regarding the process by which a jury should evaluate the credibility of a defendant who takes the stand on his own behalf has been scrutinized to ensure that the instruction does not undermine the presumption of innocence to which a criminal defendant is entitled. See, e.g., *United States v. Gaines*, 457 F.3d 238 (2d Cir. 2006). (any instruction that tells a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely undermines the presumption of innocence); *United States v. Vega*, 589 F.2d 1147, 1155 (2d Cir.1978) (Gurfein, J., concurring) (a "heavily weighted" instruction about a criminal defendant's self-interest in the outcome of a case"makes the choice of the defendant to testify . . . the basis for inferentially downgrading the presumption of innocence"); *U.S. v. Dwyer*, 843 F.2d 60 (1st Cir. 1988) ("It is hardly consistent for the court to charge the jury as to the presumption of innocence and at the same time indicate doubts about defendant's credibility.").

Here, there can be little doubt that the District Court's jury instructions regarding the process by which the jury should assess Mr. Boghosian's credibility undermined his presumption of innocence. Indeed, the Court of Appeals explicitly found that the District Court's instructions did just that:

> The district court instructed the jury that "a defendant has a deep personal interest in the outcome of his prosecution" and such "[i]nterest creates a motive for false testimony[.]" This charge is virtually identical to the charge in *United States v. Brutus*, which we held "undermines the presumption of innocence because it presupposes the defendant's guilt." (App. 3).

The reasoning behind the conclusion that such an instruction undermines the presumption of innocence was discussed by the Court of Appeals in *United States v. Gaines*, 457 F.3d 238 (2d Cir. 2006). There, the court "denounce[d] any instruction...that tells a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely" since "a defendant does not always have a motive to testify falsely. An innocent defendant has a motive to testify truthfully." *Id.*, at 246. Thus, "[a] charge that [a defendant's] 'interest create[d] a motive for false testimony' [is] true only if [the defendant] was, in fact, guilty. *Id.* The critical defect in a jury instruction that says the defendant has a motive to lie is its assumption that the defendant is guilty." *Id.*, at 247.

Here, given the District Court's instructions to the jury that Mr. Boghosian had a deep personal interest in the outcome of his prosecution and that such interest created a motive for false testimony, there can be little doubt, therefore, that the Court of Appeals reached the correct conclusion when it held that those instructions undermined Mr. Boghosian's presumption of innocence. See, e.g., *U.S. v. Matias*, 836 F.2d 744 (2nd Cir. 1988); *United States v. Assi*,

748 F.2d 62 (2d Cir. 1984); *U.S. v. Dwyer*, 843 F.2d 60 (1st Cir. 1988).

Having reached the proper conclusion that the instruction undermined Mr. Boghosian's presumption of innocence and that the error was of "constitutional magnitude," the Court of Appeals, then examined whether there was a reasonable possibility that the instructions contributed to his convictions pursuant to *Chapman v. California*, 386 U.S. 18, 24 (1967). In applying that analysis, the Court of Appeals vacated Mr. Boghosian's conspiracy conviction but not his bribery conviction based on its view of the evidence.

That decision cannot stand. In a multiple-count criminal case, where the conduct underlying the counts was interrelated, the evidence against the defendant was not overwhelming, the core of the defense to all counts was the defendant's testimony, and the trial court delivered an interested witness jury instruction that undermined the defendant's presumption of innocence, vacatur of one or more counts, but not all, due to the prejudicial effect of the erroneous jury instruction deprives a defendant with the rights to a trial by jury, due process of law, and a fair trial to which he or she is entitled.

1. The Conduct Underlying the Alleged Crimes was Interrelated

Mr. Boghosian was accused of conspiring to commit bankruptcy fraud and committing commercial bribery. In support of those charges, the Government claimed that Mr. Boghosian and Dr. Spencer made a series of materially false statements concerning their ability to provide the funds necessary to reorganize Hawaiian Airlines in

connection with the federal bankruptcy proceeding of that airline that was pending in the United States Bankruptcy Court for the District of Hawaii. The Government further alleged that, as part of that conspiracy and in furtherance of it, Mr. Boghosian caused a facsimile [the promissory note] to be transmitted from Missouri to New York with the intent of promoting commercial bribery.

Toward that end, the Government's proof showed that, in March 2003, Hawaiian Airlines filed with the Bankruptcy Court a voluntary petition for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code. In July 2004, Hawaiian Investment Partners filed a plan of reorganization for the airlines with the Bankruptcy Court, which required $300 million in new financing.

Mr. Boghosian and Dr. Spencer stated in certain filings made under oath to the Bankruptcy Court in connection with the Hawaiian Investment Plan, that through various entities they controlled, they could provide the necessary financing. According to the Government, Mr. Boghosian and Dr. Spencer used Dr. Spencer's purported financial documents to solicit interested parties to support and invest in the Hawaiian Investment Plan and to procure mobilization funds. The Government further alleged that Mr. Boghosian forwarded Agent Keeley paperwork, including a promissory note for $2.5 million, which included payment for a bribe to the agent in the amount of $500,000 so that the agent would provide $2.5 million in mobilization funds to support the Hawaiian Investment Plan.

Thus, there is no doubt that the conduct underlying the conspiracy charge and the bribery

charge was interrelated since the alleged conduct underlying the bribery charge was made in furtherance of the goal of the Hawaiian Air Joint Venture to reorganize Hawaiian Airlines. Indeed, nothing less that the Indictment itself confirms the interrelation of the conduct: The first count of the Indictment alleges that the defendants conspired to make false and fraudulent representations in connection with the bankruptcy proceedings, and, in furtherance of the conspiracy, engaged in certain over acts which included 1) the meeting between Mr. Boghosian and Agent Keeley in which Mr. Boghosian purportedly agreed to pay the $500,000 bribe to the agent, and 2) the execution of the promissory note in the amount of $2.5 million. Furthermore, the second count of the Indictment (i.e., the bribery count) claimed that Mr. Boghosian caused a facsimile to be transmitted from St. Louis to New York "in furtherance of" the purported bankruptcy fraud conspiracy. Thus, there is no doubt that the conduct underlying the conspiracy charge and the bribery charge was interrelated.

2. The Core of the Defense as to Both Counts Was the Petitioners' Testimony

In addition to himself, Mr. Boghosian called three witnesses (Ms. Sturgeon, Attorney Kratsch, and Cpt. Konop) to testify on his behalf. Essentially each of those witnesses was called to show why it was not unreasonable for Mr. Boghosian to believe that Dr. Spencer had access to the money that he claimed that he did and to corroborate Mr. Boghosian's claim that he did not know, nor have reason to believe, that the documents that Dr. Spencer had submitted in connection with the reorganization plan were fraudulent.

Of course, the value of the testimony of Ms. Sturgeon, Attorney Kratsch, and Cpt. Konop witnesses would have been substantially undermined, in not wholly rendered valueless, if Mr. Boghosian had not taken the stand on his own behalf and testified, for example, how he met Dr. Spencer, how he had several attorneys performing due diligence, why he did not believe certain negative comments regarding Dr. Spencer, why he believed that Dr. Spencer had access to the funds that he claimed he did, and explained the processes by which he investigated Dr. Spencer's background.

Insofar as the bribery charge was concerned, it was solely Mr. Boghosian's testimony which formed the defense to that charge since none of the other witnesses could shed light on the understanding that was reached between Mr. Boghosian and Agent Keeley, to the extent there was one. And, in that respect, as Mr. Boghosian testified, the sole purpose of the meeting was to discuss the rate, term, and amount of the loan for the mobilization funds; Mr. Boghosian had no idea that Agent Keeley planned to propose something illegal at the meeting; he "didn't take [Agent Keeley] seriously" when the agent said that he (Agent Keeley) was essentially stealing from the hedge fund and that the agent's claim "just didn't make any sense" to Mr. Boghosian; he thought that Agent Keeley was "posturing" through employing a negotiation technique the goal of which was to get Mr. Boghosian to pay more for the loan; he and Agent Keeley had reached "no understanding whatsoever" upon the conclusion of their meeting; he had Attorney Phillip prepare a non-binding memorandum of understanding in the form of a counter-proposal that contained different terms than the ones that had been proposed by the agent; when he had asked Agent Keeley during his February meeting with the agent if he (Agent Keeley) was giving Mr. Boghosian

"directives outside of the paperwork," he wanted to make sure that Agent Keeley was providing a definitive agreement in which all the terms and conditions were to be included and that there would be "no outside agreements"; and he flatly denied agreeing to having participated in any bribe and repeatedly testified that he considered the amount that Agent Keeley sought for himself was his fee for disbursing the loan.

Thus, whereas the Government produced a videotape of the meeting between Agent Keeley and Mr. Boghosian, printouts of e-mails from Mr. Boghosian to Agent Keeley relating to the hedge fund loan, the promissory note faxed to Agent Keeley, and called Agent Keeley as a witness to support its claim that the note covered the payment of a bribe from Mr. Boghosian, Mr. Boghosian was the best witness, and perhaps the only witness, who could explain his intention in forwarding the note to Agent Keeley - which he did so through his testimony alone.

It is therefore beyond cavil that the core of the defense to both charges was the testimony of Mr. Boghosian, and, therefore, his credibility and the jury's perception of it was central to the disposition of the charges against Mr. Boghosian by the jury.

3. The Evidence Against the Petitioner Was Not Overwhelming

The evidence against Mr. Boghosian concerning both charges was not overwhelming. In fact, the Court of Appeals made no such determination in opining that there was no reasonable possibility that the erroneous jury instruction did not contribute to Mr. Boghosian's bribery conviction. Indeed, to the

contrary, the court, in vacating Mr. Boghosian's conspiracy conviction, noted that "[t]his was a close case" that "boiled down to the credibility of [Mr. Boghosian's] testimony." Implicit in that conclusion is the court's own belief that Mr. Boghosian was a witness whose veracity and credibility were capable of being accepted by the jury; obviously, if the court thought otherwise, it would not have vacated Mr. Boghosian's conspiracy conviction since the core of his defense to that charge was his testimony.

In that vein, therefore, there was an abundance of reason to believe that the District Court's erroneous interested witness instruction contributed to Mr. Boghosian's bribery conviction since the core of his defense to that charge rested on his testimony, (described above in Section "2"), just as it did with respect to his defense to the conspiracy charge.

Moreover, one of the essential elements of the crime of commercial bribery in the first degree, as set forth in Section 180.03 of New York's Penal Law, is that the bribe caused a "concrete economic loss suffered by the bribe receiver's employer [or principal]" in an amount of more than $250. *People v. Wolf*, 772 N.E.2d 1124, 1127 (N.Y. 2002). Receipt of a "kick-back" alone is insufficient proof to establish the commission of the crime since requiring no more than the receipt of such "would in effect eliminate the economic harm element" of the statute. *Id.* Nor is the statute satisfied "by such proof of harm as a breach of the duty of faithful service by the bribed employee... or the failure of the employee to turn over the bribe payments under a constructive trust or similar theory." *Id.*, at 1127-1178.

Under settled New York law, then, the prejudice caused by the District Court's erroneous jury instruction becomes apparent with respect to the bribery charge. Mr. Boghosian testified that he believed Dr. Spencer's representations regarding his control over hundreds of millions of dollars -- testimony that the Court of Appeals found a properly charged jury could have accepted. Accordingly, even if, as the court concluded, the jury inevitably would have found that Mr. Boghosian agreed to pay a $500,000 bribe in exchange for a loan, it still might have harbored a reasonable doubt as to his intent to cause any cognizable harm to the supposed hedge fund since the signed promissory note promised to repay to the hedge fund $2.5 million, which included the supposed bribe, plus 10 percent interest and $1 million in preferred stock if the acquisition of the airline succeeded. There was no proof that the rate of return was lowered as a result of the bribe or that the terms of the loan would have caused the imaginary investors in the hedge fund any cognizable loss. On the contrary, if Dr. Spencer really controlled half a billion dollars, (as Mr. Boghosian believed), and if Mr. Boghosian actually intended to repay the loan out of the vast funds that Dr. Spencer swore that he controlled, then a jury could have acquitted Mr. Boghosian of the bribery charge on the basis that he neither intended to cause, nor caused, any cognizable harm to the supposed hedge fund in an amount of $250 or more, as required under New York State Penal Law § 180.03.

Moreover, in opining that Mr. Boghosian's testimony, insofar as the bribery charge was concerned, was belied by evidence independent of that testimony which was untainted by the erroneous interested-witness charge, the court overlooked not only much of Mr. Boghosian's trial testimony but the actual contents of the conversation between Mr.

Boghosian and Agent Keeley and the actions taken by Mr. Boghosian subsequent to that conversation. For example, when Agent Keeley pressed Mr. Boghosian to pay him a $500,000 secret payment, Mr. Boghosian resisted and expressed a desire to consult his counsel before agreeing to anything. Then, when Agent Keeley said to Mr. Boghosian, "I'm essentially, I'm stealing money from the Hedge Fund," Mr. Boghosian seemed shocked by the statement by responding "Oh my God." He then said, "I don't know," and proposed that the two men talk again the next morning. In communications the next day, there was no mention of any bribe or other illegal kickback to Agent Keeley. Thus, if the jury credited Mr. Boghosian's testimony, it could have found that the payment that he made to Agent Keeley did not include a bribe, as he maintained throughout the trial, especially since in his meeting with the agent, Mr. Boghosian insisted he was "trying to do a straight deal."

Accordingly, since Mr. Boghosian's defense to the conspiracy charge consisted of his words recorded during his meeting with Agent Keeley and his actions taken subsequent to that meeting as well as his in-court testimony, had the jury not been instructed to essentially discredit the testimony of this 51-year-old father with no criminal history, it can just as well be said that a "reasonable possibility" exists that the jury would have acquitted him of the bribery charge but for the erroneous interested witness charge. In short, if Mr. Boghosian's credibility had not been denigrated by the District Court, there would have been a reason to doubt Mr. Boghosian's guilt; therefore, the erroneous interested witness charge could not be considered harmless.

This conclusion is all the more evident especially since the Court of Appeals essentially acknowledged in its decision that Mr. Boghosian was a potentially credible witness whose testimony was capable of being accepted by the jury, which begs the question, if he was capable of being believed with respect to the conspiracy charge, why was he not capable of being believed with respect to the other crime with which he was charged?

4. The Instruction Concerned a Fundamental Principle that Was Universal in its Application to Both Counts

Lastly, the prejudicial effect of the District Court's erroneous interested witness charge does not lend itself to the sort of analytical dissection of the evidence the Court of Appeals applied since the manner in which the jury was supposed to evaluate Mr. Boghosian's credibility was universally applicable; the jury was supposed to assess his testimony in the same manner as to both counts.

This was not a case, for example, in which the jury was erroneously instructed on the elements of a weapons possession charge but properly instructed on the elements of a kidnaping charge and the conviction for kidnaping could stand because satisfaction of the elements of the kidnaping charge were not contingent on, or any way related to, the court's instruction regarding the elements of the weapons charge. Rather, the erroneous instruction delivered by the District Court regarding the manner by which the jury was to evaluate Mr. Boghosian's credibility was an instruction that pertained to the presumption of innocence - a "basic component of a fair trial under our system of criminal justice." *Estelle*, 425 U.S. at 503. Thus, the instruction was

part and parcel to the process by which the jury evaluated Mr. Boghosian's guilt or innocence of both counts. Thus, the prejudicial effect of the erroneous instructions could not be dissected as the Court of Appeals did.

Indeed, the unprecedented nature of the result reached here by the Court of Appeals is evident through a review of the results of other cases decided by that and other courts in which similar instructions were struck down for the same reasons in cases involving similarly interrelated crimes. See, e.g., *U.S. v. Matias*, 836 F.2d 744 (2nd Cir. 1988) (convictions for conspiring to manufacture and for possessing cocaine hydrochloride and possession with intent to distribute cocaine hydrochloride vacated due to jury instruction that undermined the defendant's presumption of innocence); *United States v. Assi*, 748 F.2d 62 (2d Cir. 1984) (convictions for conspiring to make false statements and for making false statements to the Immigration and Naturalization Service vacated due to, inter alia, jury instruction that undermined the defendant's presumption of innocence); *U.S. v. Dwyer*, *supra* (convictions for conspiring to defraud a federally insured bank and for defrauding a federally insured bank vacated due to, inter alia, jury instruction that undermined the defendant's presumption of innocence).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: Mineola, New York
September 11, 2008

Respectfully submitted,

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Counsel of Record

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App. 1

U.S. v. BOGHOSIAN, 06-2517-cr (2nd Cir. 2-26-2008)

UNITED STATES OF AMERICA, Appellee, v. and PAUL BOGHOSIAN,

Defendants-Appellants.

OF THE UNITED STATES, Respondent.

No. 06-2517-cr (L) 06-2519-cr (CON).

United States Court of Appeals, Second Circuit.

February 26, 2008.

PRESENT: HON. DENNIS JACOBS, Chief Judge, HON. SONIA SOTOMAYOR, HON. REENA RAGGI, Circuit Judges.

FOR DEFENDANT-APPELLANT WILLIAM H. SPENCER, WILLIAM H. SPENCER: JIMMIE ENGRAM, Bronx, NY.

FOR DEFENDANT-APPELLANT PAUL BOGHOSIAN: EDWARD S. ZAS, Federal Defenders of New York, Inc., New York, NY.

FOR APPELLEE: WILLIAM J. STELLMACH, Assistant United States Attorney (Michael J. Garcia, United States Attorney, Southern District of New York, *on the brief*, Katherine Polk Failla, Assistant United States

Attorney, *of counsel*), United States Attorney's Office for the Southern District of New York, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Preska, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of the district court be AFFIRMED in part and VACATED and REMANDED in part.

Following a jury trial in the United States District Court for the Southern District of New York (Preska, J.), Defendants-Appellants William H. Spencer ("Spencer") and Paul Boghosian ("Boghosian") were convicted of conspiracy to commit bankruptcy fraud, 18 U.S.C. §§§§ 157 and 371.
Boghosian was also convicted of commercial bribery, 18 U.S.C. §§ 1952(a)(3). The district court sentenced Spencer to 51 months' imprisonment and Boghosian to 24 months' imprisonment. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Citing an opinion issued by this Court after the charge in this case was delivered, *United States v. Brutus*, 505 F.3d 80 (2d Cir. 2007), Boghosian contends that the district court's interested-witness instruction was erroneous and prejudicial because it stated that his interest in the outcome of the trial

created a motive to testify falsely. "We generally review challenged jury instructions *de novo*, reversing only if the charge, taken as a whole, was prejudicial." *Brutus*, 505 F.3d at 85 (citing *United States v. Bok*, 156 F.3d 157, 160 (2d Cir. 1998)). We therefore review any errors for harmlessness. *See Neder v. United States*, 527 U.S. 1, 8-10 (1999); *see also United States v. Gaines*, 457 F.3d 238, 250 (2d Cir. 2006).

The district court instructed the jury that "a defendant has a deep personal interest in the outcome of his prosecution" and such "[i]nterest creates a motive for false testimony[.]" This charge is virtually identical to the charge in *United States v. Brutus*, which we held "undermines the presumption of innocence because it presupposes the defendant's guilt." *Brutus*, 505 F.3d at 87 (citing *Gaines*, 457 F.3d at 246-47). As in *Brutus*, this erroneous charge cannot be "`balanced' by other, more favorable language," such as the district court's instruction that Boghosian may have testified truthfully despite his interest in the outcome of the trial. *Brutus*, 505 F.3d at 87.

As this error was of constitutional magnitude, we inquire "`whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.'" *Id.* at 88 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967) (alteration in original)). We respond in the affirmative because "[t]his was a close case" that "boiled down to the credibility of [Boghosian's]

testimony." *Gaines*, 457 F.3d at 250. Boghosian's sole defense at trial was his good faith reliance on Spencer's representations. His testimony supported this defense: Boghosian testified that he disregarded the online comments about Spencer because they were unsubstantiated; Spencer's associates assured Boghosian that Spencer had sufficient financial resources to fund the reorganization plan; Boghosian could not verify Spencer's representations by contacting ABN Amro because the bank would not release information to a third party; and Boghosian was skeptical of the undercover agent's assertion that Spencer was a "crook" with "bogus" documentation. If the jury credited this testimony--or even if it found Boghosian careless, negligent, or foolish, but still honest--it would have concluded that he did not conspire to commit bankruptcy fraud. Because the erroneous interested-witness charge went directly to the heart of the matter submitted to the jury, there is a reasonable possibility that it contributed to the conviction. We therefore vacate Boghosian's conspiracy conviction and remand for retrial.

However, we affirm Boghosian's commercial bribery conviction. Boghosian testified that he interpreted the undercover agent's characterization of their agreement--as "essentially stealing" from the hedge fund--to be merely an attempt to drive up the price. Boghosian also testified that he sent a counteroffer to the agent the following day, rather than an acceptance. These explanations are belied

by the videotape recording of Boghosian agreeing to wire $500,000 to the agent's personal offshore account and by Boghosian's transmittal of a signed promissory note reflecting the terms proposed by the agent. This evidence was independent of Boghosian's testimony and was therefore untainted by the erroneous interested-witness charge, permitting us to conclude that there is no "reasonable possibility" that the error contributed to Boghosian's commercial bribery conviction. *Brutus*, 505 F.3d at 88.

Accordingly, we vacate Boghosian's conspiracy conviction and remand for retrial, and we affirm his commercial bribery conviction.

There is evidence supporting Spencer's conspiracy conviction that is independent of Boghosian's testimony. However, the only conspiracy proved at trial is a two-person conspiracy between Spencer and Boghosian; so it is hard to confine the impact of the charge to Boghosian's conspiracy conviction alone. Moreover, at oral argument the government stated that vacatur of Bogosian's conspiracy conviction would justify vacating Spencer's conviction as well. We therefore vacate Spencer's conviction and remand to the district court for retrial. We decline to address Spencer's ineffective assistance of counsel and Sixth Amendment claims.

The judgments of the district court are hereby AFFIRMED in part and VACATED and REMANDED in part.

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse
40 Foley Square, New York, New York 10007

Catherine O'Hagan Wolfe
Clerk of Court

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynahan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of June two thousand and eight,

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UNITED STATES OF AMERICA,

ORDER

Appellee,

No.:
06-2517-cr(L)
06-2519-cr(CON)

William H. Spencer,
Paul Boghosian,

Defendants-Appellants.

Paul Boghosian having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel hearing,

and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:

Catherine O'Hagan Wolfe

By: _____
Frank Perez, Deputy Clerk

UNITED STATES COURT OF APPEALS
Filed
June 18, 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT